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No. ——

In the Supreme Court of the United States

OCTOBER TERM, 1966 7

UNITED STATES OF AMERICA, APPELLANT

v.

CHARLES JACKSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JURISDICTIONAL STATEMENT

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OPINION BELOW

The order and opinion of the district court dismissing count one of the indictment (Appendix, *infra*, pp. 9–13) is reported at 262 F. Supp. 716.

JURISDICTION

The order of the district court dismissing count one of the indictment on the ground of the unconstitutionality of the statute on which the indictment was founded was entered on January 9, 1967. Notice of appeal to this Court was filed on February 6, 1967. The jurisdiction of this Court to review, on direct appeal, a judgment dismissing an indictment because

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of the invalidity of the statute on which it is founded is conferred by 18 U.S.C. 3731.

STATUTE INVOLVED

18 U.S.C. 1201(a) provides:

> Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

QUESTION PRESENTED

Whether the federal Kidnaping Act, 18 U.S.C. 1201(a), unconstitutionally impairs the right to trial by jury by providing for the death penalty, in cases where the victim has been harmed, "if the verdict of the jury shall so recommend."

STATEMENT

Count one of a two-count indictment returned in the District of Connecticut charged that appellees, in violation of 18 U.S.C. 1201(a), transported in interstate commerce a named person who had been kidnaped and held for the purpose of aiding the appellees to escape arrest and for ransom, and that the kidnaped person was harmed when liberated.[1] The trial court dis-

[1] Count two of the indictment charged appellees with the interstate transportation of a stolen motor vehicle in violation of 18 U.S.C. 2312. Appellees have not challenged count two.

missed this count of the indictment, holding the Act unconstitutional as impairing the right to trial by jury. The court found that, since the death penalty is mandatory if recommended by a jury and cannot be imposed without such recommendation, trial by jury entails a risk of death which may be avoided or at least substantially reduced by waiving jury trial. The court suggested that even if the trial court has the power to submit the issue of punishment to a jury following a guilty plea or a non-jury trial, that power is discretionary and will not necessarily be invoked. The court concluded that Section 1201(a) makes the assertion of the Sixth Amendment right so costly as to impair its free exercise and that the statute therefore violates the Constitution.

THE QUESTION IS SUBSTANTIAL

1. The decision below strikes down a federal statute enforced over a period of thirty-five years notwithstanding other challenges to its validity. See, *e.g., Robinson* v. *United States,* 324 U.S. 282. The decision, if followed in other districts, would leave the federal government without present means to deal with the interstate aspects of a particularly grave and odious felony as to which Congress long ago determined that State law enforcement efforts require federal supplementation. The significance of Section 1201 for law enforcement was recognized in *Chatwin* v. *United States,* 326 U.S. 455, 462–463, where this Court found that, "armed with this legislative mandate, federal officials have achieved a high and effective control of this type of crime" and have eliminated a crime that "had become an epidemic in the

United States." A decision holding so important a statute to be unconstitutional manifestly presents a serious question.

The implications of the decision below are not limited to the Kidnaping Act. The decision casts doubt upon prosecutions under the bank robbery statute, 18 U.S.C. 2113(e), which contains a similarly worded penalty provision ("punished by death if the verdict of the jury shall so direct"). That provision was enacted in 1934 as part of the same legislative program that added the death penalty provision to the Kidnaping Act (see 78 Cong. Rec. 8775–8776). More recently, Congress has made a jury recommendation a precondition to the death penalty (and to life imprisonment as well) in prosecutions under the Atomic Energy Act for disclosing, receiving or tampering with certain restricted data, 42 U.S.C. 2274–2276 ("but the penalty of death or imprisonment for life may be imposed only upon recommendation of the jury").[2]

2. Certainly in committing the issue of punishment to the jury Congress did not seek or intend to impair the constitutional right to jury trial on the issue of

[2] Compare 18 U.S.C. 1992 which provides that a person convicted of train wrecking resulting in death is subject "to the death penalty or to imprisonment for life, if the jury shall in its discretion so direct, or, in the case of a plea of guilty, if the court in its discretion shall so order." Both 49 U.S.C. 1472(i) (aircraft piracy) and 18 U.S.C. 34 (destruction of aircraft or motor vehicles resulting in death) impose the death penalty if the jury recommends it "or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived trial by jury, if the court in its discretion shall so order."

guilt.[3] Accordingly, any permissible construction of Section 1201 that avoids constitutional infirmity should be preferred. *United States* v. *Harriss,* 347 U.S. 612; *United States* v. *Witkovich,* 353 U.S. 194, 201–202. Assuming, as we do, that a statute may not make an appreciably enhanced hazard of a death sentence the price of asserting a constitutional right, we point out that there are available interpretations of Section 1201 which would equalize that hazard regardless of whether guilt is ascertained by the jury, the court or by guilty plea.

(*a*) Section 1201 may be construed to require the submission of the penalty issue to a jury when guilt and harm to the victim have been established by plea or by trial to the court. The likelihood of a death penalty would then be wholly unaffected by the de-

[3] The legislative history sheds little light on interpretation of this provision. As originally enacted in 1932 (47 Stat. 326), the Kidnaping Act contained no provision for the death penalty. The House Judiciary Committee had reported a bill which authorized a death penalty unless the jury recommended mercy (75 Cong. Rec. 13294), but it was opposed on the ground that it did not accord with traditional federal practice giving the court the power to impose penalities. An amendment was adopted providing for punishment by death or imprisonment in the discretion of the court (75 Cong. Rec. 13288, 12396–13297). There was opposition to the death penalty (75 Cong. Rec. 13284–13286, 13294–13295) and the bill passed by the Senate which had no death penalty was substituted and enacted (75 Cong. Rec. 13303–13304).

In 1934, the death penalty clause was added to the 1932 Act with several other amendments (48 Stat. 781). The House report merely states that its addition "is to permit the jury to designate a death penalty for the kidnaper." H. Rep. No. 1457, 73d Cong., 2d Sess., p. 2. There were no hearings and no debates on this provision. See H. Rep. No. 1595, 73d Cong., 2d Sess.

fendant's election or waiver of jury trial on the issue of guilt. Such a construction seems consistent with the statutory language. Indeed, there is no reason to suppose that Congress intended to make the severity of sentence depend upon the mode of determining guilt.[4]

(*b*) Alternatively, the act may be construed as giving the trial court discretionary power to submit or withhold the penalty issue from a jury, regardless of the procedure by which guilt is determined. Thus the judge would be free to withhold the question of penalty in a case tried to a jury or to submit it to a jury where there has been a guilty plea or a trial to the court. A defendant would then run no greater risk in seeking trial by jury. That Section 1201(a) gives the trial court discretionary power to submit the penalty issue to a jury following a guilty plea has been recognized in at least one circuit. *Seadlund* v. *United States,* 97 F. 2d 742, 748 (C.A. 7). That the trial court has power to withhold the penalty issue when the issue of guilt is submitted to a jury seems implicit in the Second Circuit's recent approval of two-stage trials. *United States* v. *Curry,* 358 F. 2d 904, 913–916.

2. Even on the district court's premises, there is no sound reason to strike down the Kidnaping Act in its entirety. As noted above (p. 5, n. 3, *supra*), the provision authorizing the death penalty was added to

[4] *Waley* v. *United States*, 233 F. 2d 804 (C.A. 9), which was relied on by the court below, holds only that the question of guilt need not be submitted to a jury after a guilty plea has been entered; the appellant there did not suggest and the court did not decide whether the penalty question alone may or must be submitted to a jury after a guilty plea.

the 1932 Act by amendment in 1934. If that added provision is invalid, the rest of the statute is clearly severable. As this Court said in *Champlin Rfg. Co.* v. *Commission,* 286 U.S. 210, 234:

> * * * The unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

See also *United States* v. *Harriss,* 347 U.S. 612, 627. Here, there is no possible basis for doubting that Congress resolutely intended to make the interstate transportation of kidnaped persons a federal crime; the infirmity, if any, in the capital penalty clause does not require the total frustration of that purpose. In no event, therefore, should the charge have been dismissed.

CONCLUSION

It is respectfully submitted that probable jurisdiction should be noted.

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